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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 156

ELMER E. REMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 3748–3777) affirming the judgment of conviction is reported at 205 F. 2d 277.[1] The subsequent opinion, findings and order of the District Court (see Appendix, *infra*) pursuant to this Court's mandate are reported at 122 F. Supp. 673.[2] The *per curiam* opinion of the Court of Appeals (Pet.

[1] This Court granted a writ of certiorari (346 U. S. 884) and remanded the case to the District Court for a supplementary hearing (347 U. S. 227, 230).

[2] Following this decision in the District Court this Court restored the case to its docket and remanded the whole record to the Court of Appeals (348 U. S. 904).

App. i–iii) reaffirming the judgment of conviction is reported at 222 F. 2d 720.

JURISDICTION

The judgment of the Court of Appeals reaffirming petitioner's conviction was entered on May 23, 1955. (Pet. App. iv), and the petition for certiorari was filed June 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence introduced by the Government at the supplementary hearing was sufficient to overcome the presumption of prejudice arising from extraneous jury contacts and to justify a finding that they were harmless to petitioner.

2. Whether the trial judge abused his discretion in denying petitioner's pretrial motions to inspect certain of his records held by the Government, in view of petitioner's prior opportunities to examine these records and the belated filing of the motions.

3. Whether the judgment of the Court of Appeals conforms with the principles enunciated by this Court in the so-called net worth cases.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

In February 1952, after trial on a six count indictment charging him with wilful attempted evasion of his own and his wife's income taxes for the years 1944, 1945, and 1946 petitioner was convicted under the first four counts, the jury failing to agree as to the counts involving the year 1946 (R. 3–8, 88, 3667). The judgment was affirmed by the Court of Appeals (R. 3748–3777). Upon the Government's confession of error in this Court the case was remanded to the District Court for the sole purpose of holding a hearing concerning an extraneous contact with a juror which had occurred during the trial, and to "determine the circumstances, the impact thereof

upon the jurors and whether or not it was prejudicial." *Remmer* v. *United States*, 347 U. S. 227, 230.

After a three day hearing pursuant to this mandate, the District Court made findings of fact and concluded that the circumstances disclosed were harmless to petitioner and in no way affected the fairness of his trial or the jury's verdict. (See Appendix, *infra*.) Petitioner then sought a rehearing in this Court. This Court restored the case to the docket and remanded the whole record to the Court of Appeals for reconsideration in the light of Judge Goodman's findings and in the light of this Court's decisions in the so-called net worth cases.[4] *Remmer* v. *United States*, 348 U. S. 904. The Court of Appeals, after consideration of supplemental briefs submitted by both parties (Supp. R. 338–339),[5] reaffirmed the judgment of conviction (Pet. App. i–iv).

At the trial the Government demonstrated that petitioner had failed to report all his taxable income for the years involved by evidence of increases in his annual net worth which the jury

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[3] The hearing was conducted by Judge Goodman who had had no prior connection with the case. Judge Foley, who presided at the trial, took the stand and testified at the hearing.

[4] *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; and *United States* v. *Calderon*, 348 U. S. 160.

[5] The record of the supplemental proceedings pursuant to this Court's mandate will be designated "Supp. R."

could reasonably conclude resulted from the current income of certain gambling enterprises. The paramount issue was whether the income from a number of alleged partnerships actually belonged entirely to petitioner or had been split between himself and his alleged partners. The evidence to support the jury's verdict was detailed at considerable length in the Government's brief on the merits when the case was first before this Court (No. 304, October Term 1953), and we respectfully refer the Court to that brief for the facts which prove petitioner's complete control of the alleged partnerships (pp. 8–30, 79–81), the unavailability of his personal financial records and the inadequacy of the records of the alleged partnerships (pp. 44–48), and the accuracy of the starting point (pp. 30–35, 56–65) and the results (pp. 35–36, 65–72) of the Government's net worth computation.

Pursuant to this Court's mandate the Government assumed the burden of proof at the supplemental hearing on the extraneous jury contact and presented every witness who could possibly have had any knowledge of the affair, twenty-six witnesses in all. The evidence to support Judge Goodman's finding that the matter was harmless to petitioner may be summarized as follows:

I. F. Smith, the juror who was eventually elected foreman, had a business and hunting club acquaintance with a man named Satterly (Supp. R. 51–52, 59–60, 111–112). Satterly had a repu-

tation for joviality[6] and his relationship with Smith involved a great deal of good-natured banter (Supp. R. 51–52, 59, 89, 116, 125). For some years prior to the trial Satterly had been employed in gambling clubs in Reno (Supp. R. 111). He was acquainted with petitioner only by sight (Supp. R. 112).

One evening, after petitioner's trial had been in progress for several days, Satterly and his wife, who were about to move to Idaho,[7] visited at the Smith home for about forty-five minutes to an hour (Supp. R. 50, 73, 112–114). The purpose of the call was to arrange the transfer of an automobile insurance policy which Smith had previously sold to Satterly (Supp. R. 50, 113). While the wives conversed at one end of the room, the husbands discussed their business and then turned to talk of guns and hunting (Supp. R. 50–53, 72, 113). At some point during the course of this subsequent social conversation, Satterly mentioned the fact that Smith was a member of the jury trying petitioner and made substantially the following comment: "I know Bones Remmer very well. He sold Cal-Neva for 850 thousand dollars. He really got about $350,000 under the table, and has about $300,000 he daresn't touch.

[6] Mrs. Satterly testified "My husband always joked" (Supp. R. 125).

[7] They were already packed for the trip and actually left Reno permanently the following morning (Supp. R. 110, 116–117, 126).

Why don't you make a deal with Bones?" (Supp. R. 52–53, 67, 72, 155, 167).[8] Smith immediately said that since he was a member of the jury he could not discuss anything in connection with petitioner (Supp. R. 52–53). Satterly's remark was made in the same friendly manner in which he had been speaking all evening, and he laughed at Smith's answer and said no more about the case for the remainder of the visit[9] (Supp. R. 52–53, 94).

Smith felt reasonably certain that Satterly had spoken in jest (Supp. R. 89, 220). However, he was not absolutely certain,[9] and the jury had been repeatedly warned by the trial judge to report any attempt to discuss the case with them

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[8] Satterly himself testified that he could not recall having made any such remarks, and that if he had done so "it was all in fun" (Supp. R. 118–119). He testified, however, that in the course of the conversation he said that he would postpone his departure from Reno a few days to go hunting if Smith could get off the jury, and that Smith simply answered that he could not discuss the trial (Supp. R. 113, 117–118). Mrs. Satterly overheard something similar to this and thought it was a joke (Supp. R. 126). Mrs. Smith heard her husband raise his voice and say that he could not discuss the trial and heard Satterly laugh in reply (Supp. R. 128).

[9] Smith had some slight suspicion that Satterly might have been feeling him out, and that he might have gone to petitioner if Smith had indicated any interest. Smith stated that if he had been sure that this was Satterly's purpose, he would have felt that petitioner was being exploited, and he would, if anything, have been influenced in petitioner's favor. (Supp. R. 95–98, 155.)

(Supp. R. 53, 89). Accordingly, after thinking about the occurrence for a day or so, he reported it to Judge Foley. The judge agreed that Satterly appeared to be joking, but he warned Smith not to let the affair influence him against petitioner "because it could very well be that some busybody might be trying to work his way into the case somewhere, and without any knowledge on the part of Mr. Remmer at all". (Supp. R. 53–57, 133–135.) The judge then called the incident to the attention of one of the prosecutors and told him that, while he believed that Satterly was joking, he felt that the possibility of an attempt to influence a juror should be investigated (Supp. R. 135–137, 226–228).

Thereafter, Smith was interviewed by an agent of the Federal Bureau of Investigation, who had been instructed to investigate the conduct of Satterly (Supp. R. 151–152, 229–231). The agent carefully explained the purpose of his investigation, and he said nothing to indicate that Smith himself was under any suspicion (Supp. R. 60, 152, 169–170). Smith repeated in detail the story he had previously related to Judge Foley and told the agent everything he knew about Satterly (Supp. R. 57–60, 152–156, 166–168). The incident was never mentioned to Smith again for the duration of the trial and he dismissed it from his mind completely until after the verdict

has been returned" (Supp. R. 61, 90, 106–108).

Smith did not inform anyone else of Satterly's remark, nor did he mention his interviews with the judge and the FBI agent, until after the trial was over (Supp. R. 61, 78, 83, 98, 107). The other eleven jurors and the two alternates testified unanimously that he had never mentioned the incident to them during the trial (Supp. R. 172, 180, 184, 182, 183, 192, 193, 195, 213, 214, 215, 217, 219). Smith testified that his verdict was in no way affected by his conversation with Satterly[11] (Supp. R. 61, 65).

The jury deliberated, with Smith as foreman, for two and a half days (Supp. R. 179). After they had returned their verdict and had been dismissed, Smith was approached by newspaper reporters and asked about his conversation with Satterly. It was the farthest thing from his mind at the time and he was dumfounded. (Supp. R. 65–66, 101–102.) That evening while

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[10] On the basis of the agent's report it was concluded that no action against Satterly was warranted (Supp. R. 157–158, 230).

[11] Counsel for petitioner objected to this expression of opinion by the juror as to whether his verdict had been affected, and the judge stated that he would not rest his decision upon such opinion evidence (Supp. R. 36–37, 61–65; see Appendix, *infra*, p. 23). Thereafter petitioner himself introduced in evidence two affidavits signed by Smith in which he stated emphatically that his judgment in the case had not been influenced either by Satterly's comments, or by his conversation with Judge Foley, or by his interview with the FBI agent (Supp. R. 90–96).

he was riding home with two fellow jurors, Tinkham and Mrs. Mack, Smith mentioned the Satterly incident during a general conversation about the trial and passed it off as probably a joke, but said that he had reported it to Judge Foley. There were general expressions of relief at the conclusion of the three months of trial, and Tinkham particularly remarked that he had been under strain and pressure because he operated a one-man business. (Supp. R. 183–187.) Mrs. Mack testified that Smith drove her home after Tinkham had left them, and that just as they finally parted Smith told her that he wanted to thank her for working with him on the jury because he had been under pressure, and said that some day he would tell her why he was so interested (Supp. R. 174–178). Smith denied this (Supp. R. 103).

Another juror, Richard Curnow, testified that, as he was leaving the courthouse one day during the trial, one of the guards at the door asked him whether he had heard any discussion among the jury indicating that one of the panel had been approached, to which he replied that he had not. He believed the guard was Deputy Marshal Boyd whom he had previously known.[12] (Supp. R. 195–209.) Boyd denied asking such a question (Supp.

[12] Petitioner is mistaken in stating (Pet. 16) that Curnow at first denied that he knew the name of the deputy marshal, but later identified him as Boyd. (See Supp. R. 203, 208–209.)

R. 248–255). Counsel for petitioner introduced an affidavit of Curnow in which he swore that the incident had not influenced his decision (Supp. R. 209–211), and one of petitioner's counsel testified that Curnow had made an oral statement to the same effect to him. (Supp. R. 265–266). Judge Goodman found that the incident did not in any way affect the jury's verdict. (See Appendix, *infra*, p. 23.)

ARGUMENT

1. In remanding this case to the District Court for a supplementary hearing this Court held that any irregular private communication with a juror during a trial is presumptively prejudicial. "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." After pointing out that it could not be determined upon the record then before the Court whether what had occurred was harmful or harmless, the opinion directed the District Court to hold a hearing to determine whether or not it was prejudicial to petitioner. *Remmer* v. *United States, supra*, pp. 227, 229–230.

That hearing has now been held. The Government assumed the burden of proof and presented twenty-six witnesses, all who could possibly have had any knowledge of the affair. Petitioner had full opportunity for cross-examination and for

presentation of additional evidence himself. Contrary to petitioner's assertions (Pet. 26–27), full scope was allowed for development of all the facts relative to Smith's conversations with Satterly, Judge Foley, and the FBI agent, and to Curnow's conversation with the deputy marshal. And Judge Goodman found, after listening to three days of testimony and argument, that none of the circumstances developed in any way affected the jury's verdict or were harmful to petitioner.

There is no merit in any of the issues raised by petitioner (Pet. 3–5, 24–32) in this connection. Satterly's reputation as a joker, the bantering relationship between him and Smith, and the circumstances in which Satterly's remark was made (during a social conversation after a legitimate business transaction, with no change of tone, in the presence of the two wives, and with Satterly on the point of leaving the vicinity permanently), all these confirm the reasonableness of Smith's conclusion that Satterly was jesting as usual. But since the juror had some lingering doubt he prudently informed Judge Foley who advised him to treat the occurrence as a joke and cautioned him not to let it influence him against petitioner. The FBI agent made it clear to Smith that he was investigating Satterly and said nothing to indicate that there was any suspicion of Smith. None of the other jurors was aware of the incident, and it dropped so completely out of

Smith's mind that he was surprised when reporters asked him about it after the verdict. None of his subsequent comments to fellow jurors indicates that he regarded it as serious. His thanks to Mrs. Mack and his statement that he had been under pressure were, if Mrs. Mack was not confused in her recollection,[13] simply the natural reaction of the foreman of the jury, as Judge Goodman points out (Appendix, *infra*, p. 24), to the strain of three months of trial and two and a half days of deliberation. The evidence outlined in the Statement above amply supports Judge Goodman's conclusion that Smith was "a forthright and honest man who took his duties as a juror with utmost seriousness and with a full understanding of his responsibility," and that none of the circumstances developed had any effect upon his judgment" (Appendix, *infra*, pp. 25–26).

The Curnow-Boyd incident was fully canvassed

[13] As has been noted (*supra*, p. 10) junior Tinkham had spoken of the strain and pressure on him during the ride home with Smith and Mrs. Mack.

[14] The added detail of the under-the-table payment supposedly received by petitioner from the sale of Cal-Neva, developed during the testimony of the FBI agent after Smith had left the stand (Supp. R. 155, 167), added nothing essential to Smith's original testimony that Satterly's remark was that he ought to make a deal with petitioner (Supp. R. 52, 67–70, 87–88). If petitioner felt that this was important he could have had Smith recalled to the stand for further cross-examination. He did not even suggest this during the proceedings before Judge Goodman.

at the hearing and Judge Goodman's conclusion was that it did not "in any way affect the jury's verdict" (Appendix, *infra*, p. 23).

There is no merit to the contention (Pet. 24–26) that Judge Goodman should have determined, not only that there was no actual harm to petitioner, but whether the evidence precluded all reasonable possibility of harm. Any such *reasonable* possibility was dispelled by the finding of actual harmlessness. It is the reasonable possibility of prejudice inherent in such irregular contacts which gives rise to the presumption of harm and imposes upon the Government the heavy burden of establishing the contrary. This Court remanded the case to the District Court to determine whether the contact was harmless and Judge Goodman's finding is fully supported by the evidence.[15]

2. Petitioner's contention (Pet. 5–6, 32–37) that he was denied the right to inspect, prior to trial, certain of his records held by the Government was not within the terms either of this Court's order remanding the case to the District Court for a hearing on the extraneous jury contact, or of this Court's subsequent order remanding the whole record to the Court of Appeals. (See *supra*,

[15] The facts of *Stone* v. *United States*, 143 F. 2d 70, 76–78 (C. A. 6th), upon which petitioner relies (Pet. 25–26), are vastly different from those in the present case. The juror in that case was twice approached and he had good reason to believe that a serious attempt had been made to bribe him. Furthermore, it was forcibly brought to the attention of all the other jurors that some such incident had happened.

pp. 3–4.) This issue was treated at considerable length in the Government's brief on the merits when the case was here previously (No. 304, October Term 1953) and the Court is respectfully referred to pages 81 to 92 of that brief. Suffice it to say here that petitioner's accountants and attorneys had ample opportunity to examine the records in question prior to trial, and actually availed themselves of those opportunities. The trial judge acted within the limits of sound discretion in denying petitioner's belated motions as purely dilatory, and there was nothing to indicate that the defense was deprived of any document which would have been useful to it at the trial.[16]

3. Petitioner's present attacks upon the validity of the net worth proof (Pet. 6–8, 19–24, 37–50) have for the most part been answered at length in the Government's previous brief on the merits (pp. 56–81), which demonstrates that the evidence of unreported income in this case fully satisfied the requirements which have been set forth in the *Holland*, *Friedberg*, *Smith*, and *Calderon* opinions. That evidence was sufficient to justify the jury in concluding that, whatever the amount of cash petitioner had on hand at the starting point, it was insufficient to account for his excess increases in net worth; that the income

[16] There was no basis for an instruction, as is now contended (Pet. 49–50), permitting the jury to infer that documents favorable to the defense had been withheld by the Government.

slightest doubt, and I so find, that the purpose of the investigation was to determine whether or not *Satterly* had committed an offense.

I am completely satisfied that the incident referred to had no effect whatever upon the judgment, or the integrity or state of mind of the foreman of the jury. After thorough examination, the foreman appeared to me to be a forthright and honest man who took his duties as a juror with the utmost seriousness and with a full understanding of his responsibility.[5] His testimony, plus that of the FBI agent Collister, the Judge of the Court and Assistant U. S. Attorney Thompson, is conclusive that the incident referred to was not in any way concerned with any investigation of the jury as to the conduct of any member of the jury either relating to the trial of the case or otherwise.

Consequently, the court finds that "the incident complained of" was entirely harmless so far as the petitioner was concerned and did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of

[5] One of the jurors, Mrs. Helen Mack, testified that after the verdict, foreman Smith told her that he had been under great pressure. This, it was argued, indicated he had been affected by the Satterly incident. This, however, is a wholly unwarranted inference. The case had been under discussion by the jury for 2½ days. Another juror also stated that he had been under pressure. What was obviously referred to was the strain of several months of trial and days of deliberation, as well as the necessity of attending to the private business of the juror. Since the foreman had relieved his mind by promptly reporting the Satterly incident to the trial judge, it is obvious that he was not referring to it as a "pressure" in his conversation with juror Mack.

the jury, or any of the members of the jury. Thus any presumption of prejudice[6] is conclusively dispelled. The finding aforesaid is one entirely of fact.

It has been argued by the defense that even though the court should determine factually that the defendant was not harmed, nevertheless, there is still doubt, in a legal sense, as to how the foreman's mind was affected by the incident, and therefore the doubt should be resolved in favor of defendant and a new trial granted. But that means that decision would rest on conjecture and hypothesis and not fact. The Supreme Court had the power to decide the question involved as a matter of law. It did not do so. Hence our decision must be on fact.

It has been contended that Satterly's comment to the foreman concerning the defendant's alleged interest in Cal-Neva, was an unauthorized and improper communication to a member of the jury relating to a matter in issue upon the merits of the trial, and hence, since it was not disclosed to the defense, warrants a new trial. While the failure of the trial court to disclose this incident to the defense, can be considered error (*Remmer v. U. S. supra*), yet at most it would be only presumptively prejudicial. And I find that, in fact, under all the circumstances, it was harmless. *U. S.* v. *Compagna*, 146 F. 2d 524, 528.

Ordered, Adjudged and Decreed that the "incident complained of" was harmless to the de-

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[6] *Remmer* v. *U. S.*, 347 U. S. 229; *Mattox* v. *U. S.*, 146 U. S. 140; *Wheaton* v. *U. S.*, 133 F. 2d 522.

fendant Remmer and in no way affected the fairness of his trial or the jury's verdict."

Dated: July 10th, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed July 10, 1954.

"Inasmuch as the Supreme Court has not specified, in its mandate, what the court should do if it finds the "incident complained of" harmless, I have followed the procedure of making the foregoing order. I have directed the Clerk of the court to file the foregoing opinion, findings, and order and to forthwith transmit a certified copy thereof to the clerk of the U. S. Supreme Court and furnish a copy thereof to defense counsel and the U. S. Attorney. A true copy of the transcript of the testimony shall be retained by the Clerk to be available to the Supreme Court, if required.

U. S. GOVERNMENT PRINTING OFFICE: 1955

from the alleged partnerships for the years involved belonged entirely to him and was not split among his alleged partners; and that the so-called "markers," having been treated by petitioner and his associates as cash items, were properly included in the computation.[17] There is no necessity to repeat the arguments here.[18]

No complaint was raised as to the instructions when the case was here before, but petitioner now urges (Pet. 44–49) that the trial court's charge to the jury did not meet the standards prescribed by this Court's opinion in the *Holland* case. The present contention is that the charge did not properly explain either the net worth method or the element of wilfulness, and that specific instructions requested by the defense on these issues were improperly refused.

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[17] As we have pointed out in the previous brief on the merits (p. 72), petitioner's own computation of the net worth increase of the B-R Smoke Shoppe, the only business in which the cash nature of the "markers" is questioned, arrived at substantially the same result as the Government's computation. Furthermore, as was also shown (pp. 65–66, 71–72), this "marker" issue affected only the year 1945.

[18] Petitioner argues (Pet. 20, 40–41) that the starting point lacked a solid foundation because the trial court refused his proffered proof of an additional $10,000 owing to him at that time. But this is a question of the correctness of a ruling excluding defense evidence, rather than a question of the validity of the Government's case. It was not raised when the case was here before, and a brief examination of the record reveals that the proffer did not indicate what materiality it had to the net worth computation (R. 3204–3205, 3207).

At the trial the defense did not object to the charge as given in either of these two respects (R. 3493–3495) and, although objection was made to the failure to give the requested additional instructions, this was simply done by reciting the number of the refused paragraphs and no attempt was made to point out to the trial judge what they would have added to the charge as given (R. 3495–3496). We doubt that the point was properly saved, for such a general objection is hardly sufficient to preserve a specific point. See *Palmer* v. *Hoffman*, 318 U. S. 109, 116–120; *Burns* v. *United States*, 274 U. S. 328, 336; *United States* v. *Furlong*, 194 F. 2d 1, 3 (C. A. 7th), certiorari denied, 343 U. S. 950. The trial court had instructed the jury on the net worth theory and on wilfulness, and the duty rested on petitioner to make it clear what necessary amplifications were contained in his requests.

At any rate there is no merit in petitioner's criticisms. The portion of the charge defining the net worth theory (R. 136–138, 143) compares favorably with that given in the *Holland* case (see No. 37, October Term 1954, R. 207–208), and petitioner's own Requested Instructions 108, 109, and 114 (R. 79–83, 84–85) were incorrect in that they would have required the Government to establish the absolute value of his assets at the starting point. The Government is only required to establish the starting point "with reasonable certainty." (*Holland* v. *United States*, *supra*, p.

132) and it does "not have to prove the exact amounts of unreported income * * *" (*United States* v. *Johnson*, 319 U. S. 503, 517). As to the element of wilfulness, the substance of petitioner's Requested Instructions 69, 75, 77, 78, 79, 80, 81, 82, 88, 89, and 90 (R. 73–79) was given in the court's Instruction No. 9 (R. 133), in which the jury was warned to disregard bona fide mistakes, and in Instruction No. 11 (R. 134-135) in which the court said:

> There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.
>
> The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.
>
> If you find from the evidence beyond a reasonable doubt that the defendant did consciously, knowingly, and intentionally fail to report or cause to be reported his true income and thereby the Government was cheated or defrauded of taxes, you

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> may find that he intended to evade the tax. However, you must not convict the defendant unless the evidence has convinced you beyond a reasonable doubt that he knew he was doing wrong.

Thus the jury was clearly told what type of intent it must find in order to convict petitioner. Whatever might be the effect of the trial court's additional ambiguous definition of the word "wilful" (Pet. 48), if used as the sole instruction on the element of wilfulness, it is unnecessary to decide here. Petitioner should have given the trial court the opportunity to resolve any possible doubt in the minds of the jury by a proper objection.

CONCLUSION

For the reasons stated in the Government's previous brief on the merits as well as those appearing above, it is submitted that the decision of the court below is correct and that no reason is presented for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1955.

In the Supreme Court of the United States

OCTOBER TERM, 1955

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the Court of Appeals (O. R. 3748–3777)[1] affirming the judgment of conviction is reported at 205 F. 2d 277.[2] The subsequent opinion, findings and order of the District Court (R. 33–39) pursuant to this Court's

[1] References to the original record filed in this Court when the case was here before (*Remmer* v. *United States*, No. 304, October Term, 1953) will be designated "O. R." References to the record of the present proceeding will be designated "R."

[2] This Court granted a writ of certiorari (346 U. S. 884) and remanded the case to the District Court for a supplementary hearing (347 U. S. 227, 230).

APPENDIX

In the United States District Court for the District of Nevada

No. 12177

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

ELMER F. REMMER, DEFENDANT

Pursuant to the directions of the Supreme Court, 347 U. S. 230, a hearing was had in the above entitled court at its court room in Carson City, Nevada, on June 7, 8, and 9, 1954, for the purpose of determining whether or not the "incident complained of," and described in the opinion of the Supreme Court, 347 U. S. 228, was harmful to the petitioner, i. e., defendant Remmer.

The government assumed the burden of proceeding with the evidence. The court heard the testimony of 27 witnesses:

12 members of the jury.

2 alternates on the jury.

The person who communicated with the foreman of the jury during the trial of the case.

The Trial Judge.

The secretary to the Trial Judge.

5 government attorneys who participated in the conduct of the case.

The FBI agent who investigated the "incident complained of."

mandate are reported at 122 F. Supp. 673. The *per curiam* opinion of the Court of Appeals (R. 339–340) reaffirming the judgment of conviction is reported at 222 F. 2d 720.

JURISDICTION

The judgment of the Court of Appeals reaffirming petitioner's conviction was entered on May 23, 1955 (R. 341). The petition for a writ of certiorari was filed June 15, 1955, and was granted (limited to questions presented under III A of the petition) on October 10, 1955 (R. 341). The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court correctly construed and applied the law, announced in this Court's previous opinion in this case, as to the presumption of prejudice which attaches where there is an extraneous contact with a juror during the trial about a matter pending before the jury.

2. Whether the District Court abused its discretion in finding and concluding from the evidence adduced at the hearing that the extraneous jury contacts were harmless to petitioner and that the presumption of prejudice arising from such contacts was thus affirmatively rebutted.

Following this decision in the District Court, this Court restored the case to its docket and remanded the whole record to the Court of Appeals (348 U. S. 904).

A deputy U. S. Marshal who, among other deputies, had charge of the jury during the trial.

The wife of the person who communicated with the foreman of the jury.

The wife of the foreman of the jury.

One of the attorneys for the defendant.

Since the Supreme Court empowered this court, if it found that "the incident complained of" was harmful to the petitioner, to grant a new trial, the court proceeded as if it were hearing a motion for a new trial based upon the ground that "the incident complained of" was harmful to the defendant. (This is the hearing that the Supreme Court declared should have been held in the first instance.)

I find that what occurred was as follows:

On or about December 20, 1951, after the trial of *U. S.* v. *Remmer* had been in progress approximately three weeks, one James H. Satterly visited the home of Irwin J. Smith, foreman of the jury, for the purpose of conducting some insurance business with Smith, who was an insurance agent or broker. As well, Satterly had a social acquaintance with the foreman as a fellow hunter. During the course of the visit at the foreman's home, Satterly made substantially the following comment:

> I know Bones Remmer very well. He sold Cal-Neva for $850,000 and really got about $300,000 under the table which he daresn't touch. Why don't you make a deal with him?

Foreman Smith interrupted Satterly and in substance replied that he was a member of the jury and that he had been instructed by the court

STATEMENT

On April 9, 1951, an indictment in six counts was filed against petitioner in the United States District Court for the District of Nevada, charging violations of Section 145 (b) of the Internal Revenue Code of 1939. The first and second counts alleged that petitioner wilfully attempted to defeat and evade income taxes due and owing by himself and his wife for the year 1944, in the amount of $27,379.08. The third and fourth counts charged evasion of his own and his wife's income taxes for the year 1945, in the amount of $11,090.34. The fifth and sixth counts charged similar evasion for the year 1946, in the amount of $117,129.62. (O. R. 3–8.) After a jury trial which lasted approximately three months, from November 28, 1951, until February 22, 1952, petitioner was convicted on the first four counts; the jury failed to agree as to the counts involving the year 1946 (O. R. 85, 3667). On February 29, 1952, he was sentenced to imprisonment for five years and was fined $5,000 on each of the first four counts. The terms of imprisonment were made to run concurrently, but the fines were cumulative (O. R. 89–91). The conviction was affirmed unanimously by the Court of Appeals for the Ninth Circuit (O. R. 3748–3777).

This Court granted a writ of certiorari (346 U. S. 884). Upon the Government's confession of error on the failure of the trial court to grant

not to discuss the case with anyone. No more was said on the subject.

Foreman Smith regarded the comment of Satterly as being jocular, but, later, after turning the incident over in his mind, and being mindful of the admonition of the court,[1] reported it to the trial judge, the Honorable Roger T. Foley on December 22nd. Thereupon Judge Foley notified the U. S. Attorney's office and Assistant U. S. Attorney Bruce R. Thompson visited Judge Foley. The Judge and Mr. Thompson discussed the incident and Mr. Thompson decided that the incident should be investigated with the view of determining whether Satterly had committed an offense against the laws of the United States.[2] To that end, and for that purpose, FBI agent T. Hiram Collister was directed to make an investigation. Mr. Collister then interviewed Foreman Smith, advising him at the time that he, Smith, was not being investigated, but that the FBI was making an investigation to determine whether or not there had been a violation of law by Satterly. Information concerning Satterly was given by foreman Smith to agent Collister. The agent further made inquiries as to the criminal and credit record of Satterly. The FBI was then unable to locate Satterly, who had departed for the northwest. Subsequently, the FBI returned a report to the U. S. Attorney, in substance con-

[1] At each recess, the trial judge admonished the jury "not to permit anyone to talk to you about the case * * * if anyone should persist in talking to you about the case, after you have informed them that you are a member of the venire, you report that individual to the court."

[2] 18 U. S. C. § 1503.

taining the foregoing facts. The U. S. Attorney's office then determined that there was not sufficient evidence upon which to take proceedings against Satterly. None of the foregoing matters were, at any time, communicated to any member of the jury or to the two alternates, and none of the jurors or alternates learned of the foregoing events until after their verdict was rendered. Satterly denied that he had made the comment to foreman Smith.

The foreman of the jury testified that the events described in no way affected his state of mind or his vote in arriving at the verdict.[4]

It is not true that the FBI agent was sent to investigate the foreman of the jury as to his conduct, as was conjectured in the opinion of the Supreme Court (p. 229). There is not the

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[3] One of the jurors testified that during the trial one of the deputy marshals who had charge of the jury inquired of him whether he knew or had heard of any outsider talking to a juror about the case. The juror thought that it was deputy marshal Boyd, but was uncertain about it and conceded that it might have been another deputy. Deputy Marshal Boyd denied that any such conversation had occurred. Thus the testimony in this regard is most vague, but even if some such event occurred, it had not the slightest bearing upon the subject matter of the hearing, nor did it in any way affect the jury's verdict.

[4] I permitted the witness to testify that the Satterly incident did not prejudice his verdict. There seems to be a division of authority as to whether such opinion testimony is admissible. (See *Mattox* v. *U. S.*, 146 U. S. 140; *Ryan* v. *U. S.*, 191 F. 2d 779, 781; *U. S.* v. *Rakes*, 74 F. S. 615; *Higgins* v. *U. S.*, 160 F. 2d 222; *Stone* v. *U. S.*, 113 F. 2d 70.) Being mindful of this state of the law, I stated, at the time the answer of the witness was admitted, that I would not base decision upon such opinion testimony.

close personal friends, but was based upon business dealings and chance meetings at a hunting club of which both were members. (R. 51, 59, 111–112). Satterly had lived in Reno for about six years during which time he was employed as a "dealer" in gambling clubs (R. 110–111). He had purchased a house and automobile insurance through Smith (R. 51, 111). Smith was familiar with his background and knew that he had served a term of imprisonment in Oregon (R. 168). Smith and Satterly were hunting and fishing enthusiasts. When they met they usually engaged in banter about their respective abilities as hunters. (R. 51–52, 59, 111–112, 115–116.) Satterly, in particular, had a reputation as a joker[5] (R. 59, 89, 125).

The purpose of Satterly's visit to the Smith home was to arrange the transfer of an automobile insurance policy which he had purchased from Smith (R. 50, 71, 113, 128, 154). Satterly's car had been wrecked in an accident. He had purchased another car and wanted his insurance transferred before departing on a trip to the Northwest (R. 71–72). Satterly and his wife were moving from Reno, permanently. They were packed and ready for the trip when they called at the Smith home. (R. 53, 116–117.) They

[5] Petitioner's characterization of Satterly as a "personal friend" of Smith's (Pet. Br. 7) is correct only if taken in the very limited sense described in the text.

[5] His wife testified, "My husband always joked" (R. 125).

actually left Reno the next day for Idaho and eventually Oregon (R. 110, 117). Smith knew of their plans. Sometime prior to the visit, Satterly told Smith he was leaving Reno and listed his house for sale with Smith. Smith was unsuccessful in his efforts to sell the house, but it was sold by another real estate firm. At Satterly's request, Smith reviewed the sale before it was completed. (R. 59–60, 115–116.)

The Satterly visit lasted approximately forty-five minutes (R. 73, 114, 130). The conversation took place in the living room of the Smith home. Smith and Satterly conversed at one end of the room while their wives chatted at the other end (R. 50–51, 114, 128). First, Smith and Satterly discussed the latter's insurance problem, his pending departure from Reno; and his immediate plans for the future. The conversation then turned to talk of guns and hunting. (R. 50–53, 72, 113, 154–155, 166–167.) During the course of this latter conversation about hunting, Satterly made reference to the fact that Smith was a member of the jury trying petitioner (R. 72, 113, 167). Smith replied, "Yes, I'm busy every day" (R. 155, 167). Satterly, without any change in the tone of his conversation (R. 52), then made a remark along the following lines (R. 165, 167):*

* At the hearing, Smith could not recall Satterly's exact words (R. 52–53, 67). The summary is from the notes which F. B. I. Agent Callister made when he interviewed Smith on

> I know Bones Remmer very well. He sold Cal-Neva Club for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daren't touch—Why don't you make a deal with Bones?

Smith immediately informed Satterly, in a raised voice (R. 128), that since he was a member of the jury he could not discuss anything in connection with petitioner (R. 52–53, 71, 155, 167). Satterly laughed at Smith's reply (R. 128), and said no more about the case (R. 52–53, 155, 165). The conversation turned back to the insurance matter or hunting, and after a few minutes, the Satterlys left (R. 53).

At the hearing, Satterly could not recall having made the remark in question.[8] He testified that if he made the remark "it was all in fun" (R. 118–119). He did recall saying to Smith that if Smith "got off the case in a few days [he] would stay over and go hunting with him" (R. 117). Neither of the wives, who were sitting at the other end of the room, heard the details of the conversation between Smith and Satterly (R. 125–126, 128–129). Mrs. Satterly testified that she had some recollection of her husband say-

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December 22, 1951, as discussed hereafter (R. 167), Smith did not profess to be quoting Satterly exactly to Agent Callister (R. 165).

[8] Petitioner's statement (Pet. Br. 11) that Satterly "categorically denied at the hearing that the incident described by Smith had ever occurred" is inaccurate.